

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

**IN THE MATTER OF
GREGORY CHRISTIAN,
Grievant,**

v.

**STATE OF DELAWARE
DEPARTMENT OF CORRECTION,
Agency.**

DOCKET NO. 96-07-95

OPINION AND ORDER

BEFORE Katy K. Woo, Chairperson, Robert Burns, Vice-Chairperson, Walter Bowers and Dallas Green, Members, constituting a quorum of the Merit Employee Relations Board pursuant to 29 Del. C. § 5908(a).

AND NOW, this 19th day of June, 1997, the Board enters this Opinion and Order on this matter which was heard by the Board on June 5, 1997.

APPEARANCES

For the Grievant: Douglas B. Catts, Esquire
Schmittinger & Rodriguez
P. O. Box 497
Dover, Delaware 19903-0497

For the Agency: Allison Peters, Deputy Attorney General
Department of Justice
Carvel State Office Building
820 North French Street
Wilmington, Delaware 19801

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NATURE AND STAGE OF THE PROCEEDINGS

This matter is before the Board pursuant to Merit Rule No. 21.0120 after a Step 4 decision on July 18, 1996 adverse to the Grievant, Gregory Christian, who claims a misapplication of Merit Rule No. 5.1423 relating to his entitlement to shift differential pay as a member of the Department of Correction Vacation/Holiday Relief ("VHR") staff.

SUMMARY OF THE EVIDENCE

Correction Lieutenant James R. Patterson provided sworn testimony that he was the VHR unit manager during the period when the Grievant served on the VHR staff as K-9 unit relief. The Grievant was the only individual available in the unit to serve as relief for other K-9 staff. The VHR staff provides coverage for other staff members who are out on vacation or other leave, and the work schedule for the VHR staff can change based on the changing manpower needs of the facility. Lt. Patterson testified that when new individuals are hired they go to the VHR staff where they remain until they bid out for a different assignment. Grievant Christian worked for three to four years on the VHR staff before he bid out. There was a change in the way pay was calculated for individuals on the VHR staff during the period Grievant worked with the VHR unit. Initially, he received additional pay in the form of the shift differential for all shifts worked. According to Lt. Patterson, there were 50 to 75 individuals working on the VHR shift. He testified that there was an audit, and thereafter, the policy changed with respect to the payment of shift differential pay. After the change, only those shifts which the Department classified as "Rotating Shifts" qualified for shift differential pay.

Lt. Patterson testified that after the audit members of the VHR staff received the shift differential pay for working the 4-12 shift and for working on the 12-8 shift. The 8-4 shift was

compensated with shift differential pay only if the individual worked a different shift the week before or the week after.

Correction Sergeant Gregory Christian, in sworn testimony, stated that he worked in the K-9 unit on the VHR staff from August 6, 1995 to May 1, 1997. During that time, he was the sole relief for the K-9 staff. He would get his assignment schedule a year in advance, and when he joined the VHR staff, he was paid the shift differential for all shifts worked. After the audit, without explanation, he was no longer automatically paid the shift differential for working the 8-4 shift. Sgt. Christian testified that he had no control over the shifts he worked while on the VHR staff and felt that he should receive shift differential pay for all shifts worked.

Marsha Custer, Personnel Administrator II of the Human Resources section of the Department of Correction, presented sworn testimony concerning the payment of shift differential pay to the VHR staff. Ms. Custer stated that all shifts worked by the VHR staff other than the 8-4 shift are compensated with shift differential pay. The entitlement of VHR staff who work the 8-4 shift is determined after a review of the time cards of each individual to determine whether or not that person qualifies for shift differential pay as a result of having worked a revolving shift as that term is defined in the Merit Rules. Ms. Custer testified that there are VHR staff who only work the 8-4 shift and that all VHR personnel do not have the same schedule. Ms. Custer testified that prior to an audit there was no uniformity in the payment of shift differential pay, but thereafter, a uniform strict interpretation of the Merit Rule on entitlement to shift differential pay was put into effect.

Ms. Custer testified that the Department is not funded to pay the shift differential for all shifts worked by the VHR staff. In 1990 and again in 1994, the Department requested the State Personnel Office approve 100% shift differential pay for all shifts worked by the VHR staff. In 1990, State Personnel Office was requested to approve shift differential for the Staff Training Officers (STROs)

and the VHR staff. Approval was given for the STROs but not for the VHR staff, because some of the VHR staff worked exclusively on the 8-4 shift.

Ms. Custer testified that she reviewed the time cards for Gregory Christian for 1995, and for that year, he received shift differential pay for the weeks he was entitled to it which was approximately 65% of the time or 34 weeks. He would lose shift differential pay beginning on the first day of the second week of 8-4 shift work after having worked one of the other shifts, since the second week of the 8-4 shift did not qualify as a rotating shift under the Merit Rule definition of the term. She testified that at the time of the change of policy in the application of shift differential pay, the personnel department did not directly notify the employees but rather notified the managers and timekeepers.

THE LAW

29 Del. C. § 5931(a)

The rules shall provide for the establishment of a plan for resolving employee grievances and complaints. The final 2 steps of any such plan shall provide for hearings before the Director or the Director's designee and before the Board, respectively, unless a particular grievance is specifically excluded or limited by the Merit Rules. The Director and the Board, at their respective steps in the grievance procedure, shall have the authority to grant back pay, restore any position, benefits or rights denied, place employees in a position they were wrongfully denied, or otherwise make employees whole, under a misapplication of any provision of this chapter or the Merit Rules. The rules shall require that the Board take final action on a grievance within 90 calendar days of submission to the Board. Upon approval of all parties, the 90 days may be extended an additional 30 calendar days.

Merit Rule 5.1420

Shift Differential Pay - An employee who is authorized and required by the appointing authority to work a night shift as defined below, shall receive supplemental pay equal to 5% of the employee's paygrade midpoint.

Merit Rule 5.1423

An employee on a rotating shift schedule, shall receive supplemental pay equal to 5% of the employee's paygrade midpoint during the whole time the employee is assigned to the rotating shift.

Merit Rule Definition: "ROTATING SHIFT"

Rotating shift means the changing of a work schedule on a regular basis for at least two days in a work week which includes four or more hours of work daily or on a weekly basis, that involves a different schedule from week to week (i.e., 1st week day shift, 2nd week night shift, 3rd week day shift).

FINDINGS OF FACT AND CONCLUSIONS

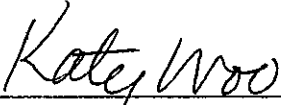
There is no material dispute of a factual nature between the parties. The Grievant worked different shifts during the year as the K-9 relief on the VHR staff, and his pay for all shifts included shift differential pay except for his work on the 8-4 shift. On the 8-4 shift, his pay included the shift differential pay only when the shift constituted a rotating shift from week to week as that term is defined in the Merit Rules. In other words, if he worked a 12-8 shift one week and then two weeks of 8-4 shifts, he would receive the shift differential for the first week on the 8-4 shift but not for the second week, since the second week was not a rotating shift.

The Board unanimously concludes that the Merit Rule definition of "Rotating Shift" has been properly applied to the Grievant and that its application in these circumstances is appropriate. The Grievant's argument that a work schedule which is beyond the Grievant's control is either completely "regular" or completely "rotating" does not describe the reality for an individual like the Grievant on the VHR staff and is not persuasive. When this Grievant worked a shift that was a rotating shift as defined in the Merit Rules he was appropriately compensated with shift differential pay which, in his case, at least in 1995, was 65% of the time. The shifts actually worked are examined to determine which are rotating shifts, and the individuals are paid accordingly. The Grievant has the burden to convince the Board by a preponderance of the evidence that his grievance should be upheld, and he has not done so in this case.

ORDER

By the unanimous vote of the undersigned members of the Merit Employee Relations Board,
the grievance is, on the basis of the foregoing, denied.

IT IS SO ORDERED:



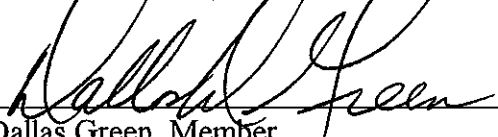
Katy K. Woo, Chairperson



Robert Burns, Vice-Chairperson



Walter Bowers, Member



Dallas Green, Member

APPEAL RIGHTS

Pursuant to 29 Del. C. § 5949, the grievant or the Agency may appeal to the Superior Court. The burden of proof of any such appeal to the Superior Court is on the appellant. All appeals to the Superior Court are to be filed within thirty (30) days of the notification of final action of the Board.

Mailing Date: 6/20/97

Distribution:

Original: File

Copies: Grievant's Representative

Agency's Representative

Merit Employee Relations Board

Katy K. Woo, Chairperson

Robert Burns, Vice Chairperson

Walter Bowers, Member

Dallas Green, Member